Supreme Court, U.S.
FILED
MAY - 9 2016
OFFICE OF THE CLERK

No. 14-9496

IN THE
Supreme Court of the United States

ELIJAH MANUEL, *Petitioner*,
v.
CITY OF JOLIET, ILLINOIS, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

Brief *Amicus Curiae* of U.S. Justice Foundation, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioner

MICHAEL CONNELLY
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

HERBERT W TITUS*
ROBERT J. OLSON
WILLIAM J. OLSON
JEREMIAH L. MORGAN
JOHN S. MILES
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

*Counsel of Record

May 9, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE FOURTH AMENDMENT GIVES RISE TO A CAUSE OF ACTION FOR MALICIOUS PROSECUTION UNDER 42 U.S.C. § 1983 TO RECOMPENSE PETITIONER'S PROTECTED PROPERTY INTEREST IN HIS PERSON 4

A. The Fourth Amendment Provides a Proper Basis for Petitioner's Claim 5

B. The Fourth Amendment Protects Manuel's Property Rights in His Person 8

C. Petitioner Has Suffered Economic Harm on Account of the Violation of His Fourth Amendment Rights 12

II. THIS COURT HAS LONG EXPRESSED DISSATISFACTION WITH THE EXCLUSIONARY RULE, PREFERRING INSTEAD OTHER REMEDIES FOR FOURTH AMENDMENT VIOLATIONS 13

A. Once a Powerful Tool Protecting Fourth Amendment Rights, this Court Has Significantly Narrowed Application of the Exclusionary Rule Over Time . 14

B. The Exclusionary Rule Has Been Limited, in Part, Because Other Remedies Would Address Fourth Amendment Violations 19

C. The Court Should Adopt an Expansive View of Malicious Prosecution Claims in Recognition of the Important Fourth Amendment Rights at Stake 21

CONCLUSION 23

TABLE OF AUTHORITIES

	Page
U.S. CONSTITUTION	
Amendment IV	2, *passim*
Amendment V	3, 22
STATUTE	
42 U.S.C. § 1983	4, *passim*
CASES	
Albright v. Oliver, 510 U.S. 266 (1994)	5, *passim*
Arizona v. Evans, 514 U.S. 1 (1995)	16
Boyd v. United States, 116 U.S. 616 (1886)	14
Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409 (2013)	2, 8, 9
Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368 (2015)	2, 8, 9
Heien v. North Carolina, 574 U.S. ___ (2014)	16
Hernandez-Cuevas v Taylor, 723 F.3d 91 (1st Cir. 2013)	7
Herring v United States, 555 U.S. 135 (2009)	16, 17, 18
Hudson v. Michigan, 547 U.S. 586 (2006)	13, *passim*
Illinois v Krull, 480 U.S. 340 (1987)	15
Kalina v Fletcher, 522 U.S. 118 (1997)	8
Mapp v. Ohio, 367 U.S. 643 (1961)	14, 17, 20
Massachusetts v. Sheppard, 468 U.S. 981 (1984)	15
Murray v. United States, 487 U.S. 533 (1988)	16
New York v. Harris, 495 U.S. 14 (1990)	16
New York v. Quarles, 467 U.S. 649 (1984)	16
Olmstead v. United States, 277 U.S. 438 (1928)	14
People v Defore, 150 N.E. 585 (N.Y 1926)	15
Segura v. United States, 468 U.S. 796 (1984)	15

Terry v. Ohio, 392 U.S. 1 (1968) 15
United States v. Calandra, 414 U.S. 338 (1974) 15
United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) 2, 8, 9, 10
United States v. Leon, 468 U.S. 897 (1984) 15, *passim*
Weeks v. United States, 232 U.S. 383 (1914) 14, 17

MISCELLANEOUS

B. Bailyn, The Ideological Origins of the American Revolution (Harvard University Press 1967) 10
W Blackstone, Commentaries on the Laws of England 12
R. M. Bloom and H. J. Massey, "Accounting for Federalism in State Courts — Exclusion of Evidence Obtained Lawfully By Federal Agents," 79 UNIV. COLO. L. REV. 381 (2007) 18
W J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," 90 HARV. L. REV 489 (1977) 18
J. P Goldstein, "From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions," 106 COLUM. L. REV. 643 (2006) 21
A. Liptak, "Supreme Court Steps Closer to Repeal of Evidence Ruling," NEW YORK TIMES (Jan. 31, 2009) 18
J. Locke, Second Treatise of Government 10, 11
S. Mills and T. Lighty, "Cops rarely punished when judges find testimony false, questionable," Chicago Tribune (May 6, 2016) 21
J. Rakove, Revolutionaries. A New History of the Invention of America (Houghton Mifflin Harcourt 2010) 11

INTEREST OF THE *AMICI CURIAE*[1]

United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org and Gun Owners of America are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These legal and policy organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law They have filed many *amicus curiae* briefs in this and other Courts, including Fourth Amendment cases such as United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012).[2]

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* Briefs *Amicus Curiae* of Gun Owners of America, *et al.* in Jones at the petition stage (http://www.lawandfreedom.com/site/constitutional/USvJones_amicus.pdf) and at the merits stage (http://www.lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf).

SUMMARY OF ARGUMENT

Petitioner Elijah Manuel has appropriately invoked the Fourth Amendment as a basis for his claim of malicious prosecution. Arrested without probable cause, Manuel was detained in actual custody for 48 days during which time the police falsified evidence before a grand jury leading to his arraignment on false charges which were dropped by the prosecutor only after discovery that the charges were baseless.

The Fourth Amendment guarantee against unreasonable searches and seizures is predicated on the right of the people to be secure in their "persons, houses, papers, and effects." Viewed against its common law backdrop, the Amendment's purpose and scope extend throughout any period of pretrial detention up to and including the day upon which all criminal charges are dropped. During that time interval, the Fourth Amendment governs the actions of the arresting authorities.

While the immediate effect of a violation of the Fourth Amendment is the deprivation of one's liberty, the interest protected by that Amendment is one's property rights. *See* Gradv v. North Carolina, citing United States v. Jones (effects) and Jardines v. Florida (houses). Foremost, the Amendment protects one's property rights in one's person. Indeed, by wrongfully holding Manuel in pretrial detention for 48 days, the City of Joliet and its police officers caused him not only emotional distress, but harmed his reputation,

inflicted out-of-pocket losses, and deprived him of employment opportunities.

Because all charges were dropped, this Court's exclusionary rule is of no value to Manuel to vindicate his Fourth Amendment interests. Indeed, this Court has severely cut back the availability of the exclusionary rule as a remedy for Fourth Amendment violations, indicating since the 1980's a strong preference for tortious actions as the primary means of enforcement.

The Seventh Circuit rule constricting the availability of a malicious prosecution action as a violation of the Fourth Amendment because it might cause "confusion" with a Fifth Amendment due process claim, in that both claims would be premised upon the same set of facts. Overlooked by this Seventh Circuit rule is the fact that the two constitutional guarantees address two distinctly different but overlapping legal interests. The Fifth Amendment due process claim would vindicate Manuel's liberty interest of freedom from restraint resulting from an unconstitutional misuse of legal process. The Fourth Amendment claim would compensate Manuel for the unreasonable seizure of his person resulting from an unconstitutional deprivation of his property interest in his person by an unconstitutional misuse of prosecutorial power. Manuel suffered violations of both of these interests.

ARGUMENT

I. THE FOURTH AMENDMENT GIVES RISE TO A CAUSE OF ACTION FOR MALICIOUS PROSECUTION UNDER 42 U.S.C. § 1983 TO RECOMPENSE PETITIONER'S PROTECTED PROPERTY INTEREST IN HIS PERSON.

This case comes to this Court from the United States Court of Appeals for the Seventh Circuit on a petition for a writ of certiorari to review that Court's affirmance of the district court's order dismissing a § 1983 civil rights claim.

Briefly, Petitioner Manuel alleges that he was arrested and taken into custody on the basis of falsified evidence, and subjected to physical violence at the scene of his arrest. Additionally, throughout a 48-day period in which he was held in physical custody, the police continually lied about the test results on pills seized from Manuel, including falsifying testimony before a Grand Jury and in an arraignment proceeding. On the fourteenth day of incarceration, a state lab report revealed that the seized pills were not illegal drugs. Finally, more than 30 days after that, the Assistant State's Attorney dismissed the charges on the basis of the state lab report, and Manuel was released from custody. A more complete statement of facts is set forth in the Brief for Petitioner and in the court of appeals opinion below. *See* Brief for Petitioner ("Pet. Br.") at 2-6; Manuel v. City of Joliet, 590 Fed. Appx. 641, 642 (7th Cir. Dec. 28, 2015).

The court of appeals affirmed the district court's order dismissing all charges as time-barred, except for Manuel's charge of malicious prosecution based upon the Fourth Amendment. As to that claim, the court of appeals upheld its dismissal on the sole ground of the Circuit's reigning precedent that "'[w]hen, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention.'" Manuel at 643.

As the Petitioner's Brief demonstrates, the Seventh Circuit rule blocking a malicious prosecution charge resting upon the Fourth Amendment not only conflicts with the law in 10 federal circuits, but also with the explanations and reasonings that a majority of Justices expressed in Albright v. Oliver, 510 U.S. 266 (1994). *See* Pet. Br. at 8, n.4. Petitioner's brief cites the opinions of the several justices in Albright in support of a number of points.[3] This *amicus* brief singles out Justice Ginsburg's concurring opinion, demonstrating how and why the Fourth Amendment applies to a malicious prosecution claim after an unconstitutional arrest, such as the claim made by Manuel in this case.

A. The Fourth Amendment Provides a Proper Basis for Petitioner's Claim.

In Albright, Justice Ginsburg offered reasons why the Fourth Amendment's "probable cause"

---

[3] *See* Pet. Br. at 8, 12, 14-16, 23-24, 26-28, 30, 34.

requirement does not end prior to a person's release from custody — such as at the time of a preliminary hearing. *Id.* at 277-80. That is the very point of contention in this case: the court of appeals below ruled that "if Manuel has a Fourth Amendment claim ... it would have stemmed from his arrest on March 18, 2011" and ceased at the point of arraignment. Manuel at 643.[1]

To the contrary, Justice Ginsburg wrote: "The Fourth Amendment's instruction to police officers seems to me more purposive and embracing." *Id.* Albright at 277. Noting that the Supreme Court had already drawn on the common law to "aid contemporary inquiry into the meaning of the Amendment's term 'seizure,'" Justice Ginsburg conducted her own review of the common law of arrest and custody, concluding that once a person has been arrested and charged with an offense, a "defendant is scarcely at liberty: he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Id.* at 279. Thus, Justice Ginsburg maintained that a defendant, even if released pretrial, is "still 'seized' in the constitutionally relevant sense." *Id.*

---

[1] Although the date the Fourth Amendment claim ends relates in this case to a statute of limitations defense, the state's position would also have the effect of limiting the state's financial exposure for such actions to the typically brief period between arrest and arraignment, even if incarceration continues for many weeks, as here.

Thus, Justice Ginsburg asserted:

> This conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers[,] govern[ing] both the manner of, and the cause for, [an] arrest.... [*Id.*]

Applying the Fourth Amendment's text, Justice Ginsburg stated: "Albright remained effectively 'seized' for trial so long as the prosecution against him remained pending, and that [police officer] Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure...." *Id.* at 280.

It is, then, the Fourth Amendment's standard of "probable cause" that governs the constitutionality of the initial arrest, and the Amendment's "reasonableness" standard that governs whether the "manner" of effecting that arrest "perpetuated the Fourth Amendment violation." *See id.* at 279. *See also* 100.

Manuel, who was held in physical custody for 48 days, remained "seized" in the constitutional sense throughout the period of incarceration. *See id.* at 279. *See also* Hernandez-Cuevas v. Taylor, 723 F.3d 91, 100-101 (1st Cir. 2013) and cases cited therein. Manuel's unconstitutionally effected arrest perpetuated the initial seizure by the Joliet police officers who falsified the evidence and misled both a

Grand Jury and the prosecutor by their duplicity in violation of the Fourth Amendment.[5]

In sum, as Justice Ginsburg reasons, whether or not an arrested and charged person is kept in custody or even if released from physical custody, the Fourth Amendment sets the standard for alleging and proving a violation of 42 U.S.C. § 1983, the breach of which gives rise to a cause of action for malicious prosecution according to the common law principles underlying that Amendment.

B. The Fourth Amendment Protects Manuel's Property Rights in His Person.

The correctness of Justice Ginsburg's common law approach to the people's liberty interests secured by the Fourth Amendment is supported by this Court's unanimous *per curiam* opinion in Grady v North Carolina, 575 U.S. __, 135 S.Ct. 1368 (2015). In Grady, this Court affirmed the holdings in United States v. Jones[6] and Florida v. Jardines,[7] that a search within the meaning of the Fourth Amendment occurred when "the Government had physically

---

[5] As Justice Scalia has observed, at common law the tort of malicious prosecution could be sustained upon proof of a malicious act coupled with the absence of probable cause and the ultimate termination of criminal charges, and this is precisely the situation in Manuel's case. *See* Kalina v. Fletcher, 522 U.S. 118, 133 (1997). *See also* Pet. Br at 7.

[6] 565 U.S. __, 132 S.Ct. 945 (2012).

[7] 569 U.S. 1, 133 S.Ct. 1409 (2013).

occupied private property for the purpose of obtaining information,'" regardless of whether the intrusion invaded the occupier's personal privacy. Grady at 1370.

As elaborated in Jones, this Court's "Fourth Amendment jurisprudence was [originally] tied to common-law trespass," consistent with the Amendment's text which secured the people's "persons, houses, papers, and effects." Jones, 132 S.Ct. at 949. And, as explained in Jardines, Jones restored this original understanding, affirming the "Amendment's property-rights baseline." Jardines, 133 S.Ct. at 1417 Thus, the first step in any Fourth Amendment analysis is to identify what, if any, property interest is at stake.

In Jones and Jardines, the property interests were a person's exclusive possession in "effects" and "houses," respectively. In Jones, the Court found that, by placing a GPS tracking device on a motor vehicle, "[t]he Government physically occupied private property," leading it to find that "no doubt ... such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.*, 132 S.Ct. at 949. In Jardines, the Court found the use of a drug-sniffing dog "in an area belonging to Jardines and immediately surrounding his house — in the curtilage of the house" — to be a search. *Id.*, 133 S.Ct. at 1414. In both cases, the Government committed a common law trespass, as had been recognized during the nation's founding era. *See* Jones, 132 S.Ct. at 949; Jardines 133 S.Ct. at 1415.

In Manuel's case, the property interest at stake is in his "person." As Jones, itself, acknowledges:

> The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their **persons**, houses, papers, and effects" would have been superfluous. [Jones, 132 S.Ct. at 949 (emphasis added).]

Far from being superfluous, the idea of having a property interest in one's person was central to the founding of the American Republic.

It is no accident that the list of protected interests under the Fourth Amendment begins with "person," as one's person is foremost among his property interests. Today, most would associate "person" with a so-called "right of privacy." But at the time the Fourth Amendment was ratified, the word "person" had a very different meaning and connotation, paralleling the 17th-century property theories of John Locke:[8]

> every Man has a Property in his own Person. This no Body has any Right to but himself. The Labor of his Body and the Work of his Hands ... are properly his. [J. Locke, Second Treatise of Government, para. 27 (facsimile ed.), reprinted in J. Locke, Two Treatises of

---

[8] *See, e.g.*, B. Bailyn, The Ideological Origins of the American Revolution at 26-31 (Harvard University Press, 1967).

> Government, pp. 287-88 (P Laslett, ed., Cambridge Univ. Press: 2002).]

Locke reasoned that "being the Master of himself, and the Proprietor of his own Person, and the Actions ... of it," a man has "in himself the great Foundation of Property...." *Id.* at para. 44. Stanford University historian and Pulitzer Prize winner Jack Rakove explains that:

> For Locke ... the concept of property encompassed not only the objects a person owned but also the ability, indeed the right to acquire them. Just as men had a right to their property, so they held a property in their rights. Men did not merely claim their rights, but also owned them, and their title to their liberty was as sound as their title to the land or to the tools with which they earned their livelihood. [J. Rakove, Revolutionaries. A New History of the Invention of America at 78 (Houghton Mifflin Harcourt, 2010).]

Applying these principles here, both Manuel's arrest and his continuing detention for 48 days without probable cause constituted a Fourth Amendment seizure because it deprived Manuel of his freedom of movement, as well as denying him work and educational opportunities to his financial detriment. Pet. Br. at 6. As Locke would have put it, the incarceration of Manuel denied him the "labor of his body and the work of his hands." *See* Locke, *supra*.

C. Petitioner Has Suffered Economic Harm on Account of the Violation of His Fourth Amendment Rights.

In her Albright concurrence, Justice Ginsburg identified with some particularity the property rights at stake when the Fourth Amendment is violated. Depriving a person of his liberty of movement may result in severely diminished "employment prospects," "reputational harm,"[9] and the "financial ... strain of preparing a defense." *Id.* at 278. In his Albright concurrence, Justice Souter affirmed Justice Ginsburg's list, repeating "reputational harm," and adding to it "inability to transact business or obtain employment in his local area; necessitating relocation ... inability to secure credit." *Id.* at 289 (Souter, J., concurring).

Unlike Albright, however, Manuel has alleged in his complaint that his arrest and pretrial detention violated his Fourth Amendment rights vested in his person. *See* Pet. Br. at 9. As Manuel points out in the concluding section of his brief, he is entitled under § 1983, not only to damages for his economic losses, but also for his emotional suffering resulting from his loss of personal liberty, caused by the malicious and

---

[9] The common law tort of malicious prosecution was linked to the common law torts of slander and libel, each of which was designed to protect a person's reputation, and to provide recompense for loss to one's trade or livelihood. *See* 3 W Blackstone, Commentaries on the Laws of England 123-26 (Univ. Chi. Facsimile ed., 1768).

indefensible actions of arresting and holding him without probable cause. *See* Pet. Br. at 33-36.

II. This Court Has Long Expressed Dissatisfaction with the Exclusionary Rule, Preferring Instead Other Remedies for Fourth Amendment Violations.

This case, of course, is not an exclusionary rule case. Because the police never found any evidence of any crime, Manuel was never brought to trial, and there was no "evidence" to suppress. However, this case is appropriately viewed in the shadow of this Court's prior rulings on the exclusionary rule. In recent years, this Court has narrowed the scope of the exclusionary rule, pointing towards other remedies as better alternatives to deter government agents from violating the constitutional rights of Americans. In this case, Manuel seeks to avail himself of one of those alternate remedies — a malicious prosecution claim based on deprivation of Fourth Amendment rights, brought under 42 U.S.C. § 1983.

Having limited the protections provided by the exclusionary rule, this Court now has a special responsibility to protect access to a civil remedy to protect Fourth Amendment rights. To do otherwise risks leaving the Fourth Amendment toothless and ineffective on all fronts. Dissenting in Hudson v. Michigan, 547 U.S. 586 (2006), Justices Breyer, Stevens, Souter, and Ginsburg echoed similar concerns, noting that "our Fourth Amendment traditions ... emphasize the need to assure that its constitutional protections are effective, lest the

Amendment 'sound the word of promise to the ear but break it to the hope.'" *Id.* at 630.

A. Once a Powerful Tool Protecting Fourth Amendment Rights, this Court Has Significantly Narrowed Application of the Exclusionary Rule Over Time.

The exclusionary rule has its modern roots as far back as Boyd v. United States, 116 U.S. 616 (1886), involving compulsory production of a person's papers. A century ago, in Weeks v. United States, 232 U.S. 383 (1914), Justice Day wrote for the Court that, if evidence could be obtained in violation of the Fourth Amendment, and then used at trial, the Fourth Amendment "is of no value, and ... might as well be stricken from the Constitution." *Id.* at 393. Olmstead v. United States, 277 U.S. 438 (1928), summarized the Weeks exclusionary rule as a "sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." *Id.* at 462. A half century after Weeks, in Mapp v Ohio, 367 U.S. 643 (1961), this Court applied the exclusionary rule to the states through the Fourteenth Amendment, and stated broadly that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.[10] As late as 1968, this Court described the

---

[10] Critics of the exclusionary rule argue that the rule protects only criminals, and often point to Justice Cardozo's famous statement that "the criminal is to go free because the constable has

exclusionary rule as "the only effective deterrent to police misconduct in the criminal context." Terry v. Ohio, 392 U.S. 1, 12 (1968).

Over time, however, support for this expansive remedy began to wane, as the Court in the 1980's severely scaled back its application in a series of cases. In United States v. Leon, 468 U.S. 897 (1984), the Court permitted the introduction of evidence discovered with a warrant that was not based upon probable cause, finding the police had acted in "good faith" while executing the warrant. There, the Court asserted that "[w]hether the exclusionary sanction is appropriately imposed in a particular case is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Id.* at 906. Both before and since Leon, various decisions of this Court have continued to limit application of the exclusionary rule in other contexts.[11]

---

blundered." People v. Defore, 150 N.E. 585, 587 (N.Y 1926). Mapp addressed such claims, noting that "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659.

[11] *See also* United States v. Calandra, 414 U.S. 338 (1974) (no exclusionary rule for Grand Jury proceedings); Segura v. United States, 468 U.S. 796 (1984) (no exclusion of evidence where police unlawfully detained a man, illegally entered his home, and illegally stayed for 19 hours awaiting a search warrant, because the evidence eventually was found pursuant to a lawful warrant); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (no exclusionary rule where police rely in good faith on defective warrant); Illinois

The Court in Leon ignored Justice Brennan's early warning that, "in case after case, I have witnessed the Court's gradual but determined strangulation of the [exclusionary] rule." Leon at 928-29 (Brennan, J., dissenting). Indeed, the modern Court's understanding of the exclusionary rule now presumes that the Constitutional text does not explicitly require exclusion of evidence,[12] and the exclusionary rule being

---

v. Krull, 480 U.S. 340 (1987) (good faith exception to exclusionary rule where statute permitting warrantless search was later found unconstitutional); Murray v. United States, 487 U.S. 533, 542 (1988) (independent source doctrine applies to avoid the exclusionary rule "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one...."); New York v. Harris, 495 U.S. 14 (1990) (no exclusion where police unlawfully arrested someone at home without a warrant, who then obtained incriminating statements from him at the police station, because the statement was not the fruit of an arrest at home); Arizona v. Evans, 514 U.S.1 (1995) (no exclusionary rule where police operated under mistake of fact based on erroneous court records); Hudson v. Michigan, 547 U.S. 586 (2006) (violation of knock-and-announce rule when serving a warrant did not require exclusion of evidence because the Fourth Amendment violation involved only how the warrant was served, and not how the evidence was obtained); Herring v. United States, 555 U.S. 135 (2009) (no exclusionary rule where police operated under mistake of fact based on erroneous police records); and Heien v. North Carolina, 574 U.S. ___ (2014) (no exclusion based on mistake of law). *See also* New York v. Quarles, 467 U.S. 649 (1984) (no exclusion of a statement obtained from a suspect, based on a "public safety' exception to *Miranda* warning).

[12] Justice Brennan believed that evidence obtained in an unconstitutional fashion could never be admitted into evidence, and that obtainment and introduction of evidence are but a single, unconstitutional government action. Leon at 933. Justice Ginsburg echoed those concerns, stating that "the Amendment 'is

only a judicially created remedy designed to deter the government from violating people's rights. Ignoring Mapp's expansive statement of the exclusionary rule's purpose, the modern Court has applied the rule based on subjective cost-benefit analyses,[13] whereby if no sufficient deterrent purpose is fulfilled by the allegedly "costly" exclusion of evidence, then the rule does not

---

a constraint on the power of the sovereign, not merely on some of its agents.'" Herring at 151-52. This had been the Court's original understanding of the exclusionary rule. The Court in Weeks v. United States, 232 U.S. 383, 392 (1914), stated that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions ... should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution...." Indeed, Weeks continued, it is "the duty of giving [the Fourth Amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Id.* at 392.

[13] Justice Breyer saw things differently, claiming that the exclusionary rule actually imposes no "cost," since if the Constitution had been followed, there would have been no evidence to begin with. Therefore, the only "cost" of the exclusionary rule was that "official compliance with Fourth Amendment requirements makes it more difficult to catch criminals." Leon at 941. Indeed, the dissenters in Hudson noted that "[t]he majority's 'substantial social costs' argument is an argument against the Fourth Amendment's exclusionary principle itself." Hudson at 614. So too did the Court in Weeks, noting that "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Id.* at 393.

apply.[14] Frequently. this Court has noted the "substantial societal cost" imposed by excluding evidence, calling it a "jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card." Hudson at 595.[15]

In 1977, Justice Brennan made the suggestion that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protection often extending beyond those required by Supreme Court's interpretation of federal law." W J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," 90 HARV. L. REV 489, 491 (1977). Indeed, many state courts have essentially overridden this Court's narrowing of the exclusionary rule. *See* R. M. Bloom and H. J. Massey, "Accounting for Federalism in State Courts — Exclusion of Evidence Obtained Lawfully By Federal Agents," 79 UNIV. COLO. L. REV. 381, 389 (2007) (noting the interesting juxtaposition whereby "[p]rior to the Mapp decision, the federal Constitution provided greater rights to individual defendants. Immediately after Mapp, rights of federal or state criminal defendants

---

[14] Dissenting in Leon, Justice Stevens noted that "[t]oday, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding." *Id.* at 977

[15] Some fear the Court's 2009 decision in Herring "jumped the firewall" and is the precursor to complete elimination of the exclusionary rule. *See* A. Liptak. "Supreme Court Steps Closer to Repeal of Evidence Ruling." NEW YORK TIMES (Jan. 31. 2009) at A1.

vis-a-vis the police were the same. Now defendants in some states are enjoying greater protections under state law than federal law ").

B. The Exclusionary Rule Has Been Limited, in Part, Because Other Remedies Would Address Fourth Amendment Violations.

The Hudson Court described the exclusionary rule as the product of a bygone age, and that "[w]e cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago." *Id.* at 597 In rejecting application of the exclusionary rule in Hudson, the Court pointed to alternative remedies which it believed would fully address constitutional violations.

In particular, the Court pointed towards 42 U.S.C. § 1983 as the best way to rectify constitutional violations,[16] noting that, during the height of the

---

[16] In truth, the Court's reliance on Section 1983 actions ignored the real world problems of such litigation. Section 1983 actions are difficult to win for numerous reasons, not the least of which is the qualified (or even absolute) immunity typically enjoyed by police and prosecutors acting within the scope of their employment. Additionally, accused criminals bringing civil suits do not typically make sympathetic plaintiffs, whereas police are specially trained to testify and to appear likeable to juries. Often, if there was no monetary harm, nominal damages are of little benefit to a victim. Lastly, even if a judgment is successfully

exclusionary rule in the 1960's, "[i]t would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities," and "[c]itizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after Mapp, with this Court's decision in Bivens...." *Id.* The Court continues its support of Section 1983 actions in lieu of the exclusionary rule, noting that "Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence...." *Id.*[17]

---

obtained, many victims find out that the police officers who violated their rights are essentially judgment-proof, and there is little or nothing to collect.

[17] The Court also pointed to "[a]nother development over the past half-century that deters civil-rights violations ... the increasing professionalism of police forces, including a new emphasis on internal police discipline." *Id.* at 598. The Court claimed that "modern police forces are staffed with professionals ... **internal discipline** ... can limit successful careers...." *Id.* at 599 (emphasis added). Of course, if these statements were true, there would be little to no "societal cost" to maintaining a robust exclusionary rule.

Unfortunately, judges who work "in the trenches" have had different experiences. In one major American city, an "investigation documented [a] troubling phenomenon, with more than a dozen examples over the past few years in which police officers, according to judges, gave false or questionable testimony -- but experienced few, if any, repercussions. ... The Chicago Police Department and the Cook County state's attorney's office **almost never hold officers accountable** in spite of claims they have a zero-tolerance policy for officers who do not tell the truth. The issue so erodes trust in the criminal justice system that the U.S. Department of Justice, as part of its civil rights investigation

Because the Court has, in part, justified its move away from the exclusionary rule because of the availability of alternative remedies for Fourth Amendment violations, it must protect those alternative remedies. In fact, in many instances, these alternative remedies can accomplish what the exclusionary rule cannot, such as the present case:

> Tort liability is especially appropriate [where no prosecution is brought] because "the exclusionary rule offers absolutely no compensation or deterrence whatsoever" when "the cops know you are innocent and just want to harass you." [J. P Goldstein, "From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions," 106 COLUM. L. REV. 643, 662-663 (2006).]

C. The Court Should Adopt an Expansive View of Malicious Prosecution Claims in Recognition of the Important Fourth Amendment Rights at Stake.

The court of appeals below justified that circuit's restricted view that "Fourth Amendment claims are typically 'limited up to the point of arraignment,' after

---

into the Police Department, has asked the Cook County public defender's office to refer cases with evidence that officers testified falsely...." S. Mills and T Lighty, "Cops rarely punished when judges find testimony false, questionable," Chicago Tribune (May 6, 2016) (emphasis added), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-testimony-met-20160506-story.html.

which it becomes a malicious prosecution claim." Manuel at 643. Apparently, this view has prevailed in the Seventh Circuit to avoid the "confusion" that might result from allowing a Fourth Amendment claim to spill over on a Fifth Amendment claim. *Id.* To avoid this confusion, the Seventh Circuit has ruled that "'[w]hen, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention.'" *Id.*

As Manuel points out in his brief, there is no good reason why the due process claim should preempt a Fourth Amendment claim arising out of the same unlawful detention. *See* Pet. Br. at 26. Although the facts may be the same, there are two distinct wrongs committed. Overlooked by this Seventh Circuit rule is the fact that the two constitutional guarantees address two distinctly different legal interests. The Fifth Amendment due process claim would vindicate Manuel's liberty interest of freedom from restraint resulting from an unconstitutional misuse of legal process. The Fourth Amendment claim would compensate Manuel for the unreasonable seizure of his person resulting from an unconstitutional deprivation of one's property interest in his person by an unconstitutional misuse of prosecutorial power.

Instead of recognizing the different interests addressed by the two Amendment guarantees, the Seventh Circuit's decision appears to rest on the overriding unconstitutional proposition that "Manuel has no Fourth Amendment right to be free from groundless prosecution." Manuel at 643. The

unstated corollary of this statement is that Manuel loses his Fourth Amendment property right to be free from unlawful seizure by the state at some arbitrary moment in time when a state prosecutor joins with the state police in perpetuating Manuel's seizure and incarceration. Such a statement views Manuel's incarceration only from the perspective of the government. It focuses narrowly on which component of law enforcement is participating in the deprivation of Manuel's right to bodily freedom. However, when these same facts are viewed from the perspective of Manuel, it becomes clear that the unlawful seizure of his body continued uninterrupted throughout his incarceration, irrespective of whether the wrongful acts were committed by the state's police alone, or with the assistance of the state's prosecutors.

CONCLUSION

The decision of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

MICHAEL CONNELLY
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

HERBERT W TITUS*
ROBERT J. OLSON
WILLIAM J. OLSON
JEREMIAH L. MORGAN
JOHN S. MILES
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
May 9, 2016